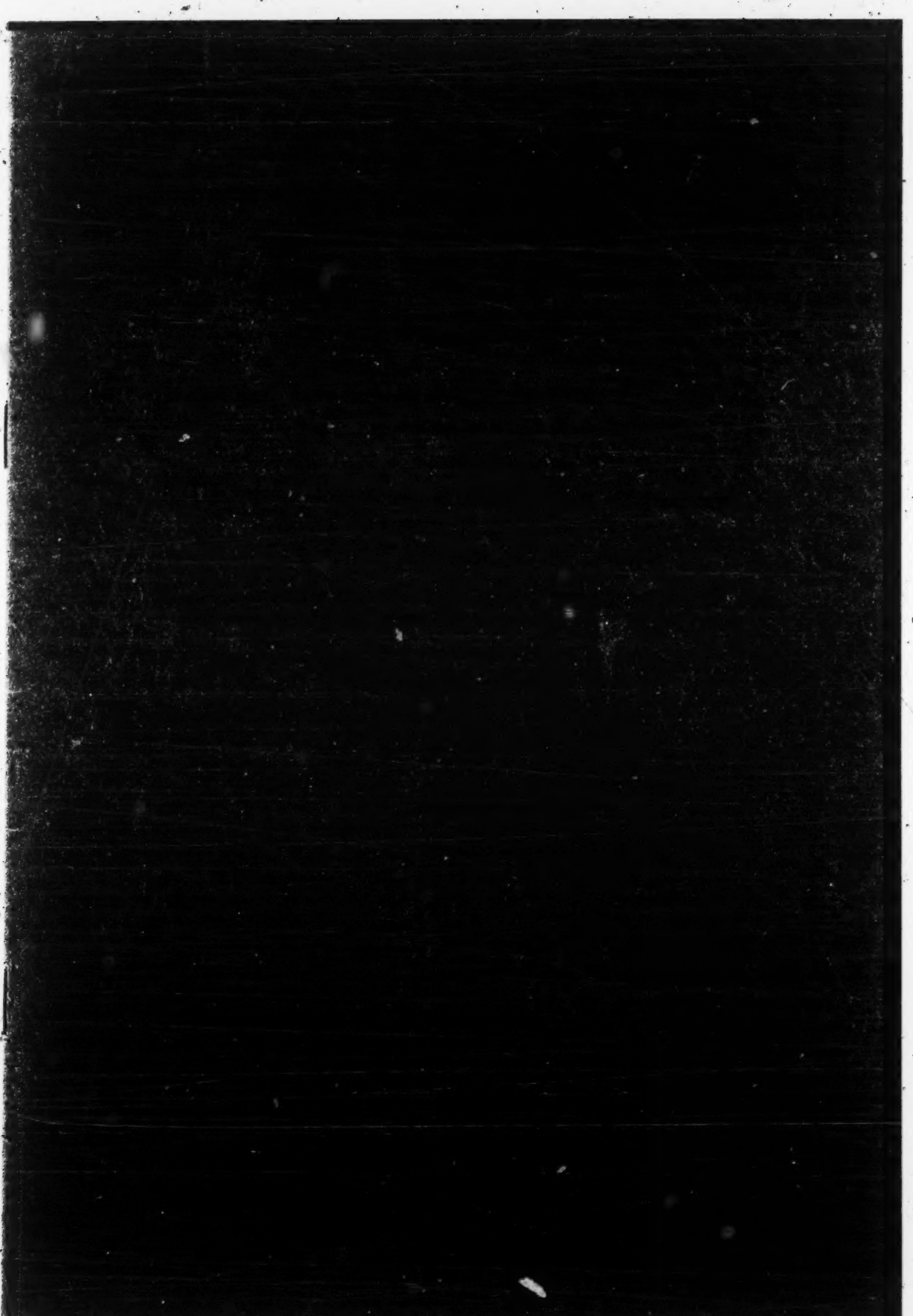

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1312

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. 6a) dismissing appellants' suit to set aside an order of the Interstate Commerce Commission (J.S. 7a-8a) which granted a certificate of public convenience and necessity to Louis Rosenbaum, doing business as El Paso-Los Angeles

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Limousine Express of El Paso, Texas (hereinafter referred to as Rosenbaum). The certificate permits the operation of a limousine service with Spanish-speaking drivers between El Paso and Los Angeles. Appellants are bus lines which operate between El Paso and Los Angeles and a national association of bus lines.

On January 5, 1965, Rosenbaum filed an application for the certificate, and, upon protests by the appellants, a full hearing was held. Twenty-seven witnesses appeared in support of the application (J.S. 20a). The testimony disclosed that persons of Mexican ancestry who live in El Paso, or at nearby points in Mexico, and who travel between El Paso and Los Angeles, are confronted by a language barrier.[1] They are often confused even though the appellant bus lines have Spanish speaking employees at their terminals and announce departures and arrivals in Spanish. It was also testified that a passenger's luggage did not always arrive at his destination with him. In addition, several witnesses testified that they found a limousine service more comfortable and that they preferred the faster limousine service (J.S. 14a-16a, 21a). The testimony also revealed that "wildcat" limousine services are currently operating between Juarez (across the Mexican border from El Paso) and Los Angeles, and that a number of persons use those illegal operators rather than appellants' bus services (J.S. 12a). The

[1] The language barrier was graphically demonstrated by the fact that none of the witnesses who testified in support of the application could read, write or speak English, and all of their testimony was laboriously elicited through an interpreter.

hearing examiner found that the proposed service would be "distinctive" on the basis of four elements: more comfort, faster service, movement of luggage on the same vehicle with passengers, and use of Spanish speaking drivers (J.S. 21a). He also found that Rosenbaum's potential market consisted largely of those persons already lost by appellants to the wildcat operations and, therefore, that the appellants would not be adversely affected by Rosenbaum's success (J.S. 22a). The Commission's Operating Rights Review Board No. 3 adopted the examiner's report and granted the application subject to certain conditions not here relevant (J.S. 7a-8a). Division 1 of the Commission and the full Commission denied petitions for further consideration (J.S. 25a-26a, 27a-28a).

The court below affirmed, concluding that the Commission's order was based on adequate findings supported by substantial evidence (J.S. 1a–5a).

ARGUMENT

This appeal does not present a substantial question warranting plenary review by this Court. The Commission's determination was based primarily on factual considerations (J.S. 11a–20a), which were carefully reviewed by the district court (J.S. 1a–4a). The evidence need not be reviewed again by this Court. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 490–491.

The Commission concluded that the existing bus service, while generally adequate otherwise, does not adequately meet the particular needs and convenience

of Spanish speaking travelers. The Commission fully explained its principal findings:

> The language barrier is, nevertheless, real. It is not difficult to picture the frustration attendant upon waiting in a bus terminal five hours for one's luggage, and not being able to speak English. Nor is it difficult to imagine the feelings of one not able to speak English when other passengers laugh at a driver's comment about that person's country. The evidence leaves no doubt but that there is a definite need simply for a more considerate service; all the reasons advanced by the witnesses for no longer using protestants are valid and indeed compelling ones. [J.S. 21a.][2]

The Commission's findings that the proposed limousine service would solve baggage problems and would be faster and more comfortable than the existing bus

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[2] The consideration of the language factor is not, as appellants urge, a sharp departure from the Commission's previous policy. The Commission has considered the language factor in many cases when determining the public convenience and needs. See *Martinez Common Carrier Application*, 78 M.C.C. 25 (1958); accord: *Bracero Transp. Co., Inc.—Migrant Workers*, 78 M.C.C. 461 (1958), *Matura Trucking Corp. Contract Carrier Operation*, 68 M.C.C. 766 (1956). Furthermore, the Commission's decision in this respect is not, as appellants suggest (J.S. 6–7), inconsistent with *Glynn S. Boles Common Carrier Application*, Docket No. MC–128601, decided April 27, 1967, reprinted on pp. 29a–33a in the jurisdictional statement. In *Boles*, the Commission found that witnesses favored the application merely on grounds of racial preference, without a showing of discrimination by the existing service (J.S. 32a–33a); here the examiner found that the witnesses had experienced serious language difficulties when travelling on appellants' buses.

service are additional support for the Commission's decision.

The appellants' principal contention seems to be that the existing service is adequate and that the added features of the proposed limousine service are merely "extras" (J.S. 5) or are "trivial" (J.S. 10) and do not justify the risk of impairment of the revenues of the existing service (J.S. 10, 11).[3] However, the Commission clearly found no risk of substantial impairment of the appellants' revenues since most of the passengers who will use the proposed service are already lost to appellants anyway. As for the value to the public of the added features in the proposed service, the Commission has broad discretion in determining the public convenience and necessity, *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65, and, as the court below concluded, its decision is well within its lawful discretion.

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[3] There is no need to reach the question raised by appellants (J.S. 9–10) whether the finding that the proposed service would reduce the illegal operations is in itself a proper ground for the Commission's decision, since that finding was not crucial to the decision (see J.S. 22a). A similar finding by the Commission was approved in *Trailways of New England, Inc.* v. *United States*, 235 F. Supp. 509, 513 (D.D.C.).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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